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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Sections of) MM Docket Nos. 92-264, 92-265, 92-266
the Cable Act of 1992)

Rate Regulation
Horizontal and Vertical Ownership Limits
Development of Competition and Diversity
of Video Programming Distribution and
Carriage

**OPPOSITION OF USA NETWORKS TO PETITION OF CONSUMERS
UNION AND CONSUMER FEDERATION OF AMERICA TO FREEZE
EXISTING CABLE RATES**

The Consumers Union and Consumer Federation of America (collectively "CU") have asked the Commission to enter an order immediately which "freezes skyrocketing cable rates."¹ The basic thesis underlying this extraordinary request is that, since the Commission's adoption of its November 1994 Going-Forward Rules, cable subscriber rates have risen more rapidly than CU considers desirable and that, therefore, cable subscriber rates should be frozen -- and the Going-Forward Rules effectively abrogated -- pending an investigation of the causes of these increases.

USA Networks maintains that this request for a rate freeze is utterly without merit. USA Networks owns one of the nation's oldest, most popular and most widely

¹ Petition to Update Cable Television Regulations and Freeze Existing Cable Rates, at 19, filed September 23, 1997 ("the CU Petition"). Public Notice of the CU Petition, inviting comment, was given on September 30, 1997.

viewed cable networks -- USA Network. USA Networks also launched the Sci-Fi Channel in September, 1992. Between the FCC's imposed 1993 rate freeze and the adoption of the existing Going-Forward Rules, Sci-Fi's audience reach was stagnant; since the relaxation of rate constraints which affected the entire cable industry, Sci-Fi has experienced extraordinary growth. Thus, USA Networks is particularly well-positioned to speak to the harms that will be experienced by the American public if CU's request for a freeze is granted.

Simply put, the imposition of a rate freeze will serve no one's interests, just as happened during the earlier cable rate freeze. As it did prior to November, 1994, a new rate freeze will force a curtailment of investment by both established and fledgling cable networks in quality programming and it will force cable operators to decline to launch new program services and not to expand their service offerings. A freeze will deprive the American public of the broad choice of quality programming they now enjoy and have demonstrated that they want. CU may choose to ignore the economic realities which justified and continue to justify the Going-Forward Rules and the Congressionally mandated policy considerations that support those rules. The Commission cannot, and surely should not, do so. The CU Petition should be dismissed summarily.

In support the following is stated:

The Current Going-Forward Rules Work

1. That the imposition of a rate freeze will diminish consumer choice and program diversity is not a matter of theory, but of experience. From April 1993 (when the Commission formally imposed a rate freeze pending its adoption of rules under the

1992 Cable Act) until approximately January 1995 (when the rules now attacked by CU began to take effect in the marketplace) there was a virtual “freeze” by cable operators on the addition of new and fledgling programming services to their offerings. The Sci-Fi channel was launched September 24, 1992. By the Spring of 1993, the Sci-Fi Channel was available in approximately 10 million homes. With the exception of the brief period during September and October of 1993, when it added over 4 million new homes, the Sci-Fi Channel, like other networks, was unable to gain new launches by cable operators. Its penetration literally stagnated. The cautious adjustments which the Commission had made to its going-forward methodology in March 1994², however well intentioned, did not provide cable operators with a sufficient incentive to add new services and to stimulate increased choice for cable consumers. From March 1994 through December 1994, the Sci-Fi Channel’s distribution increased by barely 1,000,000 homes, much of which was from increased cable subscription to systems which already distributed the channel.

2. Finally, in November 1994,³ the Commission explicitly recognized that it was necessary to remove the regulatory barriers that had been in the way of the launch and successful expansion of new cable programming services. Sixth Order at ¶22. After a few months, the revised rules began to show real world results. The revised Going-Forward Rules produced precisely the results that the Commission expected. Less than

² Second Order on Reconsideration, Fourth Report and Order, and Fifth NPRM, 59 Fed. Reg. 1743 (1994).

³ Sixth Order on Reconsideration, Fifth Report and Order, and Seventh NPRM, 10 FCC Rd 1226 (1994) (“Sixth Order”).

three years later, the Sci-Fi Channel has seen its distribution grow from 16.8 million homes to its current level of 46.1 million homes.

3. The impact of the Commission's 1993-1994 freeze on established basic cable networks like USA Network was also severe. All basic cable networks are critically dependent upon the per-subscriber license fees paid by cable operators. These revenues are a primary source of investment in new and innovative programming. During the freeze, cable operators were unwilling, and in many cases genuinely unable, to increase the per-subscriber fees they paid to their cable programming suppliers. Planned investments in original programming by basic cable networks had to be deferred or canceled altogether. This, too, changed with the advent of the existing Going-Forward Rules. As the trade press makes clear, USA Networks is hardly alone in committing significant resources to the creation of original movies and other programming.⁴ Cable subscribers, who undeniably have paid for this investment through increased cable rates, are reaping the rewards in higher quality programming and greater choice.

4. The November 1994 Going-Forward Rules thus have served to satisfy the fundamental policy predicates of the 1992 Act, predicates which have been re-emphasized in the 1996 Act. In 1992, Congress expressly directed the Commission to "promote the availability to the public of a diversity of views and information" through cable television and to "rely on the marketplace, to the maximum extent feasible" to achieve that result. See, 1992 Cable Act § 2(b), 106 Stat. at 1462. The 1996 Act re-emphasizes this fundamental directive by, among other things, sunseting rate regulation

⁴ See, e.g., "Cable's Originals," Broadcasting and Cable Magazine, page 28 (October 20, 1997).

over the CPST in 1999. Surely, there is nothing in the 1996 Act which suggests that the ultimate goal of cable regulation is no longer the promotion of program diversity and the enhancement of consumer choice. The existing rules work, not only in practical terms but in terms of the purposes of the 1992 and 1996 Acts.

The Imposition of a Freeze Would Serve no Valid Purpose

5. The CU Petition ignores all of this history. It rests entirely on the naked proposition that a freeze should be imposed because cable subscriber rates have increased, by some measures, at a rate greater than the rate of inflation. CU insists that this proves that cable service is a monopoly and will remain one for the indeterminate future. In fact, the rate increases which have occurred in the past three years prove nothing of the sort. CU has been internally inconsistent and highly selective in its use of the underlying facts. On the one hand, it insists, correctly, that the market power of cable systems is local, not national; on the other hand, it seeks a nationwide freeze on rates. Further, CU relies extensively on data found in the Commission's *1996 Competition Report* but fails to acknowledge the case studies which the Commission examined in that report. Based on these case studies, the Commission has concluded that one of the ways in which cable operators are responding to actual and potential competition is by "increasing their service offerings."⁵ CU itself acknowledges that cable penetration has also increased in the period since the adoption of the Going-Forward Rules, despite the increases in subscriber rates. These facts disprove CU's core thesis. Rates have increased under the Going-Forward Rules in a way which is commensurate with the

⁵ In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 12 FCC Rd 7829, ¶16 (1997) (summarizing findings of *1996 Competition Report*).

increase in value that cable subscribers enjoy from a broader range of programming sources and high quality programming services.

6. No one can assert that the American public is not being served by both the increase in programming alternatives available to them as well as the improvement in the quality of programming carried by networks which had been available previously. The best measure of whether the American public's needs and wants are being responded to is what the American public does with its time. According to A.C. Nielsen, in the third quarter (July-September) of 1994, the last full quarter prior to the implementation of the Going-Forward Rules, prime-time viewership to basic cable networks averaged 13.96 million homes. During the same quarter in 1997, basic cable's prime-time viewership increased to 20.57 million homes, a staggering increase of 47%.

7. CU nonetheless insists that cable subscriber rates have increased at a pace greater than was "expected" when the Commission adopted the current Going-Forward Rules. To the best of our knowledge, there was no expectation by the Commission as to the number or quality of new networks which would be launched after the adoption of the Going-Forward Rules. Nor was there any expectation regarding the investment of programming by both fledging and fully-established cable program networks. In fact, no pre-determined 'expectation' of how rates would respond to the revised Going-Forward Rules could have been established. Under those rules, the rate of increase of cable subscriber rates is not purely a function of inflation. The rules were deliberately designed to provide cable operators with sufficient incentives to add new services and to provide cable networks with the resources to invest in new, innovative and high quality

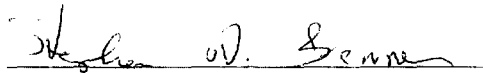
programming. The fact that cable operators expanded the services which they offer to their customers providing increased resources to cable networks, and that the cable networks used those resources wisely, could not be forecast with precision and cannot be held against the cable industry now. The Commission also has adopted rules designed to encourage and promote cable operators to rebuild their systems in order to increase their bandwidth and recover these costs through subscriber rates. Thus, the Sixth Report did not, nor could it, establish an upper limit on rate increases that might be “expected” to ensue. The imposition of a rate freeze cannot be justified on the grounds that rate increases which have indisputably contributed to increased program diversity are definitionally unreasonable because greater than the rate of inflation or some unspecified expectation by CU.

8. Most importantly, the CU Petition simply ignores the consequences of the proposed freeze on consumer choice. CU may believe itself free to ignore the lessons of history. As a matter of law as well as policy, the Commission cannot do so. The lessons of the period prior to the adoption of the Going-Forward Rules in November 1994 are unmistakable: During that freeze, diversity and consumer choice of high quality programming plainly suffered; and it will do so again if another freeze is imposed. In the circumstances, the CU claim that a freeze should be imposed can only be understood as advancing either the proposition that diversity is irrelevant or that there is no cost to cable operators and no increased economic value to subscribers from the addition of new services to cable offerings and from the investment which cable networks make in new and high quality programming. The first of these arguments is contradicted by the

language and legislative history of both the 1992 Cable Act and the 1996 Act. Both are plainly false.

9. For these reasons, the CU Petition is indefensible as a matter of law, fact and policy. It should be summarily rejected.

Respectfully submitted,



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